Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-754

RALPH VICARO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Ralph Vicaro, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, affirming his conviction in the United States District Court for the District of New Jersey of conspiracy and substantive violations under the Hobbs Act—18 U.S.C. § 1951.

Opinion Below

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix to the petition of Hugh J. Addonizio (No. 71-744), Petitioner's co-defendant.

Jurisdiction

The judgment of the Court of Appeals was entered on September 16, 1971. A timely petition for hearing *en*

banc was denied by an order entered on November 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

1. Whether extortion under the Hobbs Act (18 U.S.C. § 1951) or the different crime of soliciting a bribe is involved when a public official or his agent requests money of a contractor, engineer or supplier, who, at the time of the request, does not yet have the contractual right to perform the work in connection with which the money is to be paid.

2. Whether a defendant in a Hobbs Act prosecution who has claimed that the crime shown is bribery rather than extortion is denied a fair trial when the court refuses to explain to the jury the difference between the two crimes.

Statement of the Case

Petitioner was indicted, with fifteen others, on one count charging a conspiracy under the Hobbs Act (18 U.S.C. § 1951) and sixty-five counts charging substantive violations of that statute. The tenor of the indictment was that defendants had extorted monies from contractors, engineers and suppliers doing business with the City of Newark in connection with municipal projects involving interstate commerce. After trial with four co-defendants[1] in the

[1] His co-defendants were: Hugh J. Addonizio; Anthony La Morte; Philip Gordon and Joseph Biancone. Death, illness, pleas of guilty and lack of retained counsel on the part of the remaining defendants resulted in their severance before the case ultimately went to the jury.

United States District Court for the District of New Jersey before Hon. George H. Barlow and a jury, he was convicted on all counts but two, which the court had dismissed. On September 22, 1970, Petitioner was sentenced to twelve years in prison and fined $10,000.

At trial, the Government introduced evidence sufficient to justify a jury in believing that the defendants had systematically obtained money from various contractors, engineers and suppliers doing business with the City of Newark on projects involving interstate commerce. Those who bid on such projects were informed, generally before the bids were opened, that they would be expected to pay the defendants, among whose number were various city officials, a percentage of the value of their contracts. Most agreed to do so, and the proof showed that many of the periodic payments were picked up by Petitioner, for return to those defendants whose task it was to distribute the money to the others.

Petitioner did not testify. His defense, raised through cross-examination, his own witnesses and his summation, was that if any crime had been shown, it was something other than extortion.

Reasons for Granting the Writ

1. It was Petitioner's position at trial and on appeal that extortion under the Hobbs Act and the solicitation of a bribe, although bearing similar characteristics, are mutually exclusive crimes. That proposition was crucial to his never-submitted defense that bribery, rather than extortion, was the crime shown by the proof.

The Hobbs Act is aimed at extortion, not bribery. This is made clear not only by the very words of 18 U.S.C. § 1951, but by the fact that Section 1952, unlike the Hobbs Act, includes bribery as well as extortion among the crimes covered.

The definition of extortion in the Hobbs Act is taken almost verbatim from Former New York Penal Law §§ 850 et seq.[2] In construing the Hobbs Act, therefore, courts are "required" to look to the New York law and the interpretation given it by New York courts. See *United States* v. *Nedley*, 255 F. 2d 350, 355 (3d Cir. 1958). And it is crystal clear that under that law, bribery and extortion were mutually exclusive crimes.[3] Thus, it is essential in any Hobbs Act prosecution to determine precisely what conduct is proscribed by that Act.

In a Hobbs Act case with facts almost identical to those involved here, a federal court followed New York law and acquitted the defendant. See *United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa. 1965).[4] That case so clearly illus-

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[2] Representative Hobbs himself stated that "there is nothing clearer than the definition of robbery and extortion in this bill . . . . [T]hey are copied from the New York Code substantially." See 91 Cong. Rec. 11900 (1945).

[3] See, e.g.: *People* v. *Feld*, 262 App. Div. 909 (2d Dep't 1941) ("The two crimes are mutually exclusive"); *People* v. *Dioguardi*, 8 N.Y. 2d 260, 273 (1960) (one who pays a bribe is as guilty as the one who receives it, "which could never be the case with extortion"); *Hornstein* v. *Paramount Pictures, Inc.*, 22 Misc. 2d 996 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 659 (1st Dep't), *aff'd*, 292 N.Y. 468 (1943).

[4] The *Kubacki* case, although chiefly relied upon by Petitioner, was neither construed, nor distinguished, nor cited by the court below, which came to a contrary holding—the first such holding by any federal court.

trates the issue we raise here that it deserves extensive discussion. Kubacki was the Mayor of Reading, Pennsylvania; Roger Weidlich, the ostensible "victim" of the alleged extortion, was a salesman for Duncan parking meters. Weidlich had an appointment with Kubacki in order to persuade him to purchase Duncan meters for the City of Reading. The Mayor expressed interest, but suggested a "political donation" of about fifteen dollars per meter. It was later made clear to Weidlich, by other city officials recommended to him by the Mayor, that the "suggestion" was actually a demand, and Weidlich believed that he "would either have to make the donation . . . or lose the order." A deal was later made at six dollars for each of 500 meters—a total of $3,000.

The court, at page 640, contrasted the Government's theory with the proof as follows:

> In simple terms, the government charged that these people were compelled to make a payoff for the privilege of bidding, i.e., for the privilege of competing for the award of the parking meter contract. The evidence established, instead, that Weidlich and Roach [a Duncan executive] were bargaining for improper influence, for favored treatment, i.e., they were bargaining for the improper award of the contract to them without the necessity to compete.

In order to sustain the charge of extortion, the Government had cited numerous Hobbs Act cases. The trial court disposed of those cases in these words:

> In all the extortion cases cited by the government, the victim was compelled to pay for the exercise or enjoyment of a right or privilege already his, under threat and out of fear that if he did not comply with

> the demands he would be subjected to unwarranted interference, with resulting substantial harm to his business or property rights.

The court then noted that the Hobbs Act was based on New York law, and that in New York the crimes of bribery and extortion are mutually exclusive. The court then cited *People* v. *Dioguardi, supra,* and stated:

> The court in Dioguardi noted the distinction between bribery and extortion, the essence of the one being the voluntary giving of something of value to influence the performance of official duty, the essence of the other being duress. Applying that distinction to this case, the record is devoid of evidence of duress. While Weidlich and Roach spoke of fear that they would not "get the order," there is nothing to raise that fear above the level of disappointment over failure to obtain a new piece of business. . . .
>
> Reasonable minds could only arrive at the conclusion that what was involved in this case was bribery. If Weidlich and Roach had any fear at all, it was fear that they would not be successful in their efforts to exercise undue influence. That is not the type of fear contemplated in § 1951. They were "victims" only to the extent of possible dissatisfaction with the price, otherwise it is clear beyond question that they were willing participants, equally as guilty as the payees, in the scheme to obtain the award of the contract improperly.

So holding, the court granted the motion for acquittal on the extortion counts. That case, we submit, is almost identical to this. See also *United States* v. *Miller,* 340 F. 2d 421, 425 (4th Cir. 1965). ("In any event, Miller by his payments was purchasing influence with and favored treatment from Lawrence [the alleged bribe-receiver]. Fear of losing

his illegal advantage if the payments were discontinued was not extortion").

The court below rejected the reasoning of *Kubacki*, without citing it, as well as the reasoning of every pertinent case of the state whose statute was the model for the Hobbs Act. But that is by no means the sole reason which should persuade this Court to consider the issue. Numerous prosecutions are brought under the Hobbs Act each year. The penalties for its violation are severe. If that Act is now to cover conduct which Congress never intended it to cover, then this Court should take the responsibility of saying so, not the court below. Moreover, if what has always been viewed as the solicitation of a bribe is now to be treated as extortion, then there has not only been a definitional change, but a drastic change in the possible penalty. One who solicits a bribe in violation of 18 U.S.C. § 1952, for example, may be sentenced to no more than five years in prison; one who violates the Hobbs Act may receive a sentence four times as long. Petitioner has been sentenced to a dozen years—seven more than he might have received under a properly-drafted indictment charging bribery, and a dozen more than he legally should have received under the indictment tried.

2. It is essential to the concept of fair trial and due process that an accused's defense be adequately presented to the jurors in whose hands his fate rests.[5] Here, Petitioner's defense was that the crime shown was not extortion, but the solicitation of a bribe, and that, not having

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[5] See, e.g., *United States* v. *Kemble*, 197 F. 2d 316, 322 (3d Cir. 1952) ("Indeed we can perceive nothing more substantial than the failure of the court to charge upon the subject which was . . . [the defendant's] sole defense").

been charged with bribery, he was entitled to an acquittal. That defense was not adequately submitted to the jury.

Never once mentioning the word "bribery," never once alluding to the fact that Petitioner might be guilty of some other crime if not of extortion,[6] the trial court merely told the jury that Petitioner should be acquitted if the payments were "voluntary." No definition of what "voluntary" meant—even though, in this context, it was obviously a term of art—was ever given. This was especially prejudicial, since Government counsel had urged the jury, in effect, to construct its own definition of the term. Moreover, the trial court utterly failed to allude to those factors which distinguish bribery from extortion—factors which were abundantly present in the record.

It is difficult enough, in a case spotlighted by publicity, to be assured that a jury will concentrate on the legal and factual issues which will justly decide the case. Perhaps that is a problem which neither this Court nor any power can resolve. But a trial court's failure to explain to the chosen twelve the nature of an accused's defense and the legal principles upon which it should be accepted or rejected, surely deprives the accused of a fair trial. And that is a problem which this Court can and should resolve, not only for Hobbs Act cases, where the distinction between bribery and extortion is a narrow but crucial one, but for all cases where the accused's freedom depends upon whether the jury fully understands the theory upon which he claims he is entitled to remain free.

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[6] That Petitioner might be guilty of another crime was important for the jurors to know, lest they believe that he was immune from any punishment at all despite obvious wrongdoing and decide to convict him of the crime charged.

CONCLUSION

For the foregoing reasons,[7] the writ of certiorari prayed for should be granted.

Respectfully submitted,

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Counsel for Petitioner

[7] Petitioner also adopts so much of the reasons advanced in the petitions of his co-appellants as may be applicable to him. Those co-appellants are Hugh J. Addonizio, Anthony La Morte, Philip Gordon (No. 71-626) and Joseph Biancone.

APPENDIX A

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295
No. 19,391
No. 19,392
No. 19,393

UNITED STATES OF AMERICA

—v.—

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER

RALPH VICARO, Appellant in No. 19,295
HUGH J. ADDONIZIO, Appellant in No. 19,391
ANTHONY P. LA MORTE, Appellant in No. 19,392
JOSEPH BIANCONE, Appellant in No. 19,393

(D. C. Criminal No. 548–69)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present:

SEITZ, *Chief Judge* and FREEDMAN* and ROSENN, *Circuit Judges*

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* Judge Freedman participated in the consideration of these cases but died before any disposition was made.

Appendix A—Judgment of the United States Court of Appeals

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed September 23, 1970, be, and the same are hereby affirmed.

ATTEST:

THOMAS P. QUINN
Clerk

September 16, 1971

APPENDIX B

Order Denying Petitions for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,295
No. 19,391
No. 19,392
No. 19,393

UNITED STATES OF AMERICA

—v.—

HUGH J. ADDONIZIO, RUGGIERO A. BOIARDO, JR., ANTHONY LA MORTE, MARIO GALLO, JOSEPH BIANCONE, RALPH VICARO, NORMAN N. SCHIFF, PHILLIP GORDON, BENJAMIN KRUSCH, FRANK ADDONIZIO, LEE BERNSTEIN, JAMES CALLAGHAN, CALVIN D. WEST, ANTHONY GIULIANO, IRVINE I. TURNER, RALPH VICARO, Appellant in No. 19,295; HUGH J. ADDONIZIO, Appellant in No. 19,391; ANTHONY P. LA MORTE, Appellant in No. 19,392; JOSEPH BLANCONE, Appellant in No. 19,393.

Present:

COLLINS J. SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, and ROSENN, *Circuit Judges*

The petitions for rehearing filed by RALPH VICARO, HUGH J. ADDONIZIO, ANTHONY P. LA MORTE, and JOSEPH BIANCONE in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petitions for rehearing are denied.

By the Court,

MAX ROSENN
Judge

Dated: November 9, 1971

Nos. 71-744, 71-745, 71-754 and 71-756

In the Supreme Court of the United States

OCTOBER TERM, 1971

HUGH J. ADDONIZIO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY P. LAMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

RALPH VICARO, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH BIANCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-744

HUGH J. ADDONIZIO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-745

ANTHONY P. LAMORTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-754

RALPH VICARO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-756

JOSEPH BIANCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of New Jersey, petitioners and one Gordon[1] were convicted on sixty-three counts charging obstruction of commerce in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of conspiring to commit that offense. Petitioners Addonizio and Biancone were sentenced to ten years' imprisonment and a $25,000 fine; petitioner LaMorte was sentenced to ten years' imprisonment and a $10,000 fine; and petitioner Vicaro was sentenced to 12 years' imprisonment and a $10,000 fine. The court of appeals affirmed in an exhaustive opinion (see Pet. in No. 71-744 (Addonizio) App. A 1-50).

The evidence is set forth in full in the opinion of the court of appeals. It shows that between 1964 and 1969 in Newark, New Jersey, contractors engaged in two large scale construction projects for the city of Newark were required to pay kickbacks of ten percent of the payments received from the city. This money went to the Mayor (petitioner Addonizio) and members of the city government (including petitioner LaMorte). Petitioners Biancone and Vicaro were directly involved in extracting cash from the contractors.

1. Each petitioner contends that the trial court erred in refusing a defense request to instruct upon the differences between bribery and extortion, the former not being included in the prohibition of Section 1951. The court refused this instruction but did instruct that the extortionate conduct required under

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[1] Gordon has already filed a petition for a writ of certiorari, No. 71-626, this Term, to which we have filed a response.

18 U.S.C. 1951 did not encompass mere voluntary payments by the victim unaccompanied by any fear of economic loss (Pet. No. 71-744, App. A 49). This was sufficient under the evidence which showed that payments were made in response to extortionate demands (Pet. No. 71-744, App. A 41). At all events, the trial court's instruction adequately informed the jury that involuntariness of the payments was an essential element of the crime.

2. Petitioners LaMorte and Addonizio contend that the *voir dire* in the instant case was incorrectly conducted, because the prospective jurors were not questioned out of the presence of other jurors as to the possible prejudicial effect of pretrial publicity. This contention is dealt with fully by the court below (Pet. No. 71-744, App. A 25-29) and we rely upon its analysis and conclusion rejecting this claim. Petitioner Addonizio's additional arguments regarding the Confrontation Clause and his motion for severance are similarly discussed and properly rejected in the opinion below (see Pet. No. 71-744, App. A 35-37, 19-21). We note further that other recent cases support the position of the court below that, absent a showing of "real prejudice"—which is absent here—a defendant has no right to a severance in order that he may comment on the failure of his co-defendants to take the stand. *United States* v. *Caci*, 401 F. 2d 664, 671-672 (C.A. 2), and cases there cited, certiorari denied, 394 U.S. 917; *United States* v. *De La Cruz Bellinger*, 422 F. 2d 723, 726-727 (C.A. 9), certiorari denied, 398 U.S. 942; see also

United States v. *Rivera* (C.A. 2), petition for a writ of certiorari pending, No. 71-668, this Term.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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